THE MULTIPLICATION OF LAW REPORTS.

FOR several years much has been said and written of the problem involved in the multiplication of reports of the decisions of the American courts. Since 1895, at least, the American Bar Association has had a standing committee on Law Reporting, to take under consideration and report upon the question, which in the nature of things becomes more vexing as time runs and the reports in increasing numbers join the hosts that have preceded them on library shelves.

The output of volumes of reports has been made larger during the past twenty-five years by reason of the increase of litigation, and of the creation of intermediate appellate tribunals for the relief of the courts of last resort, federal and state; and, more recently, by reason of the multiplication in some of the states of the number of these intermediate tribunals, each with jurisdiction over territory less than the state. Texas has established eight courts of civil appeals, and Missouri has three courts of appeal. The judgments of these courts are subject to be reviewed by the supreme courts, and this very fact makes it necessary that their findings of fact be somewhat in detail and, along with their findings of law, be embodied in a written opinion. This when filed becomes a publishable unit, quotable by the bar at least, and often by courts of last resort, as authority of no inconsiderable dignity and value.

The output of published opinions of the Missouri courts, including those of the Supreme Court sitting in two divisions and in banc, for the year 1914 was 1,180, while that of the several Texas courts was 1,841. There was, therefore, the staggering aggregate of over three thousand cases from these two states—about one-seventh of the total production in all the state courts of the country. So strong did the flow from the Texas Courts of Civil Appeals become that for several years official publication of the reports of those courts was discontinued, the sole reliance of the bar and judges for these decisions then being upon the Southwestern Reporter of the National Reporter Sys-

tem. The judges of the courts of appeal of Missouri recently began to designate certain of their opinions "to be officially published," in an effort to diminish the number of volumes of the official reports.

According to a compilation made of the output of the courts for the year of 1914, the number of opinions handed down for publication by the state courts alone was 18,862. When the decisions of the several federal courts are taken into consideration, we have materially above 20,000 opinions added to our case-law, annually.

The librarian of the Association of the Bar of the City of New York reckoned the number of volumes of American law reports in 1914 to be 8,420. The *California Law Review* a few years ago said: "The number of reported cases throughout the entire United States has reached the astonishing figure of 1,000,000; the yearly increment is 25,000. The day will come when the tide of case-law will overwhelm the profession."

These yearly additions should not be a matter of astonishment when it is considered that about 288 state judges and commissioners of appeals are contributors, and that the federal judicial system adds about 137 other contributors, including the justices of the United States Supreme Court, the judges of the Circuit Courts of Appeal and the district judges, but excluding the judges of the Court of Claims and the members of the Interstate Commerce Commission.

It is manifest that as the number of courts and of judges increase with the growth of population and business, some method of lessening the tremendous volume of reported cases must be adopted.

The latest report of the Committee on Law Reports to the American Bar Association (1917), after discussing several phases of the problem, proposed for adoption a memorial to be presented to the judges of the courts of last resort and appellate courts in each state, to the United States Circuit Courts of Appeals and to the United States District Courts. This memorial is as follows:

> "For many years the accumulation of reported cases which form our body of legal precedent has been the subject of

grave concern. The acceleration in their numbers in recent years is such as to create alarm. More than 11,500 volumes of American reports are now extant, and those published within the last 30 years exceed in number the total for all the years preceding. In our system of state and federal governments we have far more courts of last resort than any other people have, and with the growth of population litigation in all these courts must increase in like proportion. Unless, therefore, the problem is seriously attacked it is not improbable that in the near future the burden of accumulated precedent will become not only serious, but insupportable. Indeed, it may ultimately jeopardize our whole theory of customary, as distinguished from codified, law, and may impair, if not destroy, our doctrine of the sanctity of judicial precedent.

"The American Bar Association recognizes the joint interest of the Bench and Bar in the premises, and does not minimize the share of the Bar in the responsibility for the evil nor its duty to co-operate in applying the remedy. It believes, however, that the matter is one for the especial cognizance of the judiciary and that no effort at reform, whether it come from the profession itself or from the legislative branch of the government, can be so effective as those remedies which judicial initiative alone can supply.

"With a deep sense of the gravity of the situation the Association is impelled, therefore, to approach the courts of the country and to urge that they seriously address themselves to the problem presented. In so doing criticism is foreign to its intent and censorship beyond its power. Certain concrete steps may be referred to because they have been so often discussed that they may be treated as representing the common judgment of the profession. These are: (a) A conscious effort at the shortening of opinions and the recognition of brevity as a cardinal virtue second only to clearness; (b) an avoidance of multiplied citations and of elaborate discussions of well-settled legal principles and of lengthy extracts from text-books and earlier opinions; (c) the presentation of so much, and no more, of the facts as are necessary to present the precise question at issue; (d) a reduction of the number of reasoned opinions and a corresponding increase in the number of memorandum or per curiam decisions, with a brief statement, when necessary, of the points decided and of the ruling authorities.

"To such efforts as may be made in pursuit of this and sim-

ilar reforms, the Association, speaking for itself and its membership, pledges to the judiciary its hearty support."

In what way may the courts, thus addressed, respond with a view to practical results?

The discussion of the question by the writer, a member of a court of last resort of one of our Southern States, will follow the order and heads appearing in the memorial.

A Conscientious Effort at the Shortening of Opinions and the Recognition of Brevity as a Cardinal Virtue Second Only to Clearness.

Doubtless an arch-enemy of brevity and conciseness of statement is to be found in the dictation to a stenographer by the judge of his opinion, and in the lack of time to revise with compression in view. A comparison of the present-day opinions with those written by the judges of earlier generations will afford proof of this. It may be too much to expect our judges to discard their stenographers if their crowded dockets are to be disposed of currently. Short of that, compact and brief opinions will largely depend upon the mental structure of the individual judge who is doing the composing—his ability to compress in a few words, yet with clearness, legal principles, so stated as to conform his statement of the law to shadings of differentiation so necessary to prevent a misapplication of the precedent in after-arising cases.

However, experience in the work of constructing opinions will make it manifest that they may be abbreviated by treating, for publication, only the one or two questions of law in a given case that are of first impression in the jurisdiction. Other points, already ruled by previously published decisions, are to be disposed of but not in the opinion for publication. A skeleton memorandum for judgment appears to be a wise method to be adopted. One of the most vigorous and soundest objections to some opinions is that they embody a retreatment of points which have been settled by previous decisions. In fact, such repetition is but useless lumber placed in the structure. Seldom does the settled principle gain in clearness or amplitude by restatement in the later decision. Rather,

caution is required in order to prevent, in the restatement of such a rule, an omission of one of its phases; and this may tend to lead the bar into the erroneous supposition that some change was purposed to be made in the rule itself. The judge who prepared the original precedent had bttter opportunity to thoroughly consider the point from all angles, and, therefore, to state the doctrine in the light of limitations and analogies which, in probability, will not occur to the judge when he merely undertakes to re-express the rule. In instances, of course, it is necessary to restate a well-established rule of law, as a part of the argumentation of an opinion upon a new or analogous point, or where some exception or extension is intended to be grafted on it.

The placing aside, for separate, unpublished disposition, of well-settled law points, as well as questions solvable by findings of fact, leaves room for the ampler and more satisfactory discussion of the novel question or questions. Such elaboration at times is not useless since it tends to make the decision in more senses than one a "bench-mark" in the jurisdiction, commending it as fit to stand stably fixed as a guide to the courts in later surveys of the field.

Nothing of symmetry is lost by such a treatment of the points of a case. Proof of this may be found in the American Reports, the editor of which often abbreviated the opinions for publication in that series of reports, by inserting notes in the body of the opinion showing "omissions"; for example, the discussion of a question of fact, or of a local statute, or of some point which was not of general interest.

This system of opinion-preparation results in brevity in another way. Where the legal questions are thus cut to the minimum, the facts necessary to be stated become fewer. Only a statement of such facts as are necessary to illustrate those points of law is called for. The saving of space that results is truly surprising to one who tries it.

There is no doubt that "statements of fact" would also be shortened if judges would write or dictate the law of the case before preparing the statement of facts. What are the essential, ultimate facts, necessary to give a setting to the decision

on the questions of law, may then more clearly be seen and appraised for incorporation. The value of an opinion is often decreased in proportion to the increased length of the statement of facts.

It is true that it is more difficult to abridge the facts than it is to state them *in extenso,* leaving analysis and the selection of those that are vital to the members of the profession. It is also recognized to be more difficult to write a concise opinion than it is to hand down a long one.

How far may the Bench fairly reply to the Bar on this question: "Bring to us in the trenches ammunition fit for shooting. What of your briefs?" Or, in the language of one of their number, never a judge, Wigmore:[1]

> "The judges are rarely left long enough in the *tenure* of their *positions* to become thoroughly familiar with the precedent-law of their own court.
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> "There is *no standard* set by a highly trained body of Supreme Court advocates, specialists, who themselves know all of their subject and skillfully present the concise essence of the actual controversy. The appellate lawyer may be any ill-trained lawyer; most of them are (relatively) tyros in that field. Hence there is no high standard by which to force the judges to the highest standard.
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> "All of these causes go back to the profession and to the community at large. Both refuse to make judicial tenure long and secure—refuse to sanction a proper system of appeals—refuse to have a select, skillful, and well-organized bar. Therefore they must expect the natural results. A common-place standard at the bar and in the community is bound to limit the achievements of public judicial officers,—inasmuch as we do not live under a benevolent despotism."

An Avoidance of Multiplied Citations.

This point is well made. The remedy, in part at least, may be found in citing the latest or the master case, or both, on the subject under review, and "cases cited therein." By a ready reference other decisions are thus opened to the investigator.

[1] 5 Wigmore, Evidence, p. vii.

Citation of, or quotation from, a few apt decisions in other jurisdictions should not be discouraged. A court that cites its own decisions only, or practically so, is likely to mold for its commonwealth a peculiar jurisprudence, out of harmony with the other states on many points of doctrine. Uniformity of decision should be the aim as far as local conditions may allow. Speaking to this point, the committee said in its report in 1916: "We regard this tendency as an evil one and fraught with dangerous possibilities. Every effort of our Association should be exerted toward bringing into complete harmony the decisions of all the states, so that there may be, so far as possible, uniformity in the law, for the whole country, and not different and conflicting general laws in the different states."

THE PRESENTATION OF SO MUCH AND NO MORE, OF THE FACTS AS ARE NECESSARY TO PRESENT THE PRECISE QUESTION AT ISSUE.

This has been partially dealt with above. It has been pointed out that quotations of long extracts from the evidence are often made, when unnecessary. The same is true of excerpts from the pleadings, of the charges of the trial judges to juries, and of contracts, deeds, and even statutes. The pith can be set forth, and unessential parts cut out, the omissions being noted by the use of appropriate typographical marks. Not only will space be saved; a gain in clarity will result.

A REDUCTION OF THE NUMBER OF REASONED OPINIONS AND A CORRESPONDING INCREASE IN THE NUMBER OF MEMORANDUM OR PER CURIAM DECISIONS, WITH A BRIEF STATEMENT, WHEN NECESSARY, OF THE POINT DECIDED AND OF THE RULING AUTHORITIES.

The draftsmen of the memorial conceive that the true remedy lies with the judges; and correctly so. In previous reports of the same committee, recommendations had been made that the power of selection of decisions for publication be lodged in the official reporters. In England the burden of selecting the cases to be reported is placed on a council of law reporting,

chosen by the bar, and "the choice of cases and the condensation of the reports is made a matter of careful consideration by well-trained men working together under well-recognized principles."

No body of men is in a better position to judge of the relative value of an opinion as a precedent than the judges who have just completed the investigation of the questions treated of; they know from an actual probing whether the opinion creates a precedent in the development of the law of the jurisdiction.

Precedents have been divided into two classes by a recent English writer,[2] who says:

> "A *declaratory* precedent is one which is merely the application of an already existing rule of law; an *original* precedent is one which creates and applies a new rule. In the former case the rule is applied because it is already the law; in the latter case it is the law in the future because it is now applied. * * * They alone develop the law; the others leave it as it was, and their only use is to serve as good evidence of it for the future. Unless required for this purpose, a merely declaratory decision is not perpetuated as an authority in the law reports. When the law is already sufficiently evidenced, as when it is embodied in a statute or set forth with fullness and clearness in some comparatively modern case, the reporting of declaratory decisions is a needless addition to the great bulk of our case-law."

If the judges are made the selectors and act on these principles, the standard of the reports that preserve the case-law will be raised. There will come an end to the publication of opinions which decide questions of fact which cannot be made to crystallize into a new legal principle or phase of doctrine, and of opinions which are not in the true sense law-making in nature. That the judges of courts of last resort make more law than do our legislators is a fact that needs to be reckoned with more—and by judges themselves. They would not fail to see the absurdity of one general assembly of a state passing

[2] SALMOND, JURISPRUDENCE, 160.

an act declaring that the act of a previous general assembly was the law. Why should a court act differently in respect of a rule declared to be law by the same court at a previous session? Why not assume, in most instances, that the precedents are known to the judges of the lower courts and to the bar?

It is not meant to be indicated that each judge should pass on the worth of his own productions for reporting purposes. The rule that obtains in one jurisdiction, at least (the Supreme Court of Tennessee), requires that four out of five judges shall vote in favor of the publication of a given opinion, in an independent balloting just after its approval as the proper disposition of the litigation.

The writer's view is that an opinion which is not voted, or selected in some prescribed mode, for publication, ought not to be filed at all, but that it should be reduced to the form of a skeleton memorandum that will not tempt some enterprising lawyer or publisher to print in an unofficial series of reports in later years. What avails it, if the court suppresses official promulgations, but preserves such opinions only to admit of later unofficial publication. The multitude of the volumes of case-law is then not diminished as it should be. In Tennessee we have several volumes of unofficial reports; and in Kentucy there is a considerable body of case-law embalmed, without authority, in the Kentucky Law Journal, the Southwestern Reporter, and an unofficial series of reports. In Nebraska there was tried out the experiment of selection by the judges, but the discarded opinions, written and filed, finally appeared in "Neb. Unoff. Reps.," and the system was discontinued.

There is an element of unfairness in the manuscript opinion (filed but not given official publication). Those members of the bar who practice in the capital city have access to such opinions that other lawyers have not. Counsel of large corporations, such as railway companies, by a system of interchange among themselves, are equipped with copies, which they are able to produce to the consternation of their adversaries. An opinion should have a birth that is Jovian or none at all. A court that refuses to stand sponsor for it ought not to allow of

its having a deformed and half-discredited existence. The demand for the publication of every opinion filed has back of it the just conception that the opportunity to know the law, quotable by way of precedent in future cases, should be common to all; and that no one should be presumed to know that law which is kept by those who made it from official publication.

It is believed that as time runs oral deliverances by judges, in cases that are not exceptional, will of necessity increase. In his early time, Lord Coke gave it as his opinion:[3]

> "And in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini libri* of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence."

The lastest successor of Coke, Baron Reading, Chief Justice of England, recently gave this concurrence: "Speaking for myself, I am strongly impressed day by day with the undesirability of the constant reporting of decisions which lay down no new principle, but only report the application of old principles to new facts."

The disposition of a majority of criminal cases, turning as they usually do on questions of fact, should be oral.

In view of the growth in the size of dockets and of the fact that a considerable proportion of the civil cases do not call for written opinions, the true remedy seems to lie in the delivery of oral opinions in such causes, accompanied by the skeleton memorandums above described. Between the "reasoned opinion" and such a memorandum lies a field where the "memorandum opinion" for publication, proposed by the committee of the American Bar Association, may serve a purpose, but it is conceived that this field is a narrower one than the members of the committee suppose. The Supreme Court of the United States is leading off in the use of that form of opinion, and the results will be noted with interest by the profession.

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[3] Co. Rep., part 3, pref. 3.

It must be expected that each state will develop its own jurisprudence; and that, as a question arises for the first time in one of the newer states, its court of last resort will pronounce for itself, rather than rely upon a previous declaration of the law in some older jurisdiction. In a state of small population certain kinds of legal questions quite naturally arise for solution later than in others where population, industries and wealth center; but it would be difficult to persuade its bar, its judiciary or its citizenship that their commonwealth should be under any sort of jurisprudential suzerainty to some other supposedly greater state.

That the increase in the output of the courts is a matter of serious concern is made manifest by the table set out below from *The Docket* of the West Publishing Company.[4] So far

[4] Output of the Courts for 1914:

Court	Opinions per Year	No. of Judges	Average Opinions per Judge	Average Words per Opinion
Ala. Sup.	606	7	87	1,450
Ala. App.	363	3	121	928
Arizona	86	3	29	3,100
Arkansas	563	5	113	1,958
Cal. App.*	441	9	49	1,950
Cal. Sup.*	312	7	45	2,386
Colo. Sup.*	151	7	22	2,470
Conn.	110	5	22	1,925
Delaware	86	7	12	3,198
Flordia	199	5	40	1,229
Ga. App.	495	3	165	1,653
Ga. Sup.	595	6	99	1,256
Idaho	118	3	39	3,491
Illinois	432	7	62	2,433
Ind. App.*	282	6	47	2,320
Ind. Sup.*	199	5	40	2,736
Iowa*	463	7	66	2,203
Kansas	493	7	70	1,851
Kentucky	913	8	114	2,073
Louisiana*	398	5	80	2,379
Maine*	172	8	22	2,379
Maryland	185	8	23	2,898
Massachusetts	488	7	70	1,303
Michigan	479	8	60	2,636
Minnesota	486	7	69	1,942

as the problem is one that is attributable to the state courts, this table shows that the volume is swelled materially by the publication of the opinions of intermediate courts of appeal. Only the outputs of such courts in Alabama, California, Georgia, Indiana, Missouri and Texas are noted in the table. Should like courts in New York, Illinois, Colorado and Tennessee be considered, it is probable that the aggregate would be enlarged to thirty per cent of the total assignable to state courts. How far the publication of the opinions of these intermediate courts is justified, is not a question within the scope of this discussion.

An analysis of the table discloses that opinions are longer in those states where the smallest number of opinions are published. This, doubtless, is largely due to the importance of the

Mississippi	253	3	84	1,650
Missouri	1,180	20	59	2,831
Montana*	121	3	40	2,450
Nebraska	402	7	57	2,207
Nevada	69	3	23	3,044
New Hampshire*	77	5	15	1,248
New Jersey	607	24	25	1,542
New Mexico*	99	3	33	2,223
New York	224	10	22	2,235
North Carolina	438	5	88	2,262
North Dakota*	153	5	31	3,770
Ohio*	73	7	10	3,289
Oklahoma Sup.	741	11	67	2,198
Okla. Cr.	211	3	70	1,337
Oregon*	439	7	63	1,651
Pennsylvania*	502	7	72	1,176
Rhode Island	123	5	25	2,892
South Carolina*	295	5	59	1,365
South Dakota	180	5	36	2,853
Tennessee	122	5	24	3,362
Texas	1,841	30	61	2,241
Utah*	91	3	30	3,627
Vermont	94	5	19	3,462
Virginia*	150	5	30	2,145
Washington	720	9	80	1,662
West Virginia*	295	5	59	2,821
Wisconsin*	409	7	58	1,846
Wyoming	32	3	11	2,018

Note: The number of words in opinions is secured from our editorial records and is an actual count except in those states indicated by (*). In these states the total is estimated from an actual count of 100 cases.

cases in which those few opinions are written. Ohio is, perhaps, the most striking example.

It appears from these statistics that the average annual output of a state judge is about 69 opinions. This leaves out of consideration cases disposed of orally, by memorandum and manuscript opinion, as is the custom in some of the states. It is not probable that this average production can be cut to a figuse below 40 or 50 opinions; and in the main relief must come from those judges who will study and take time and pains to abbreviate in all feasible ways.

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